KERR-McGEE CORP.

IBLA 80-1 Decided March 19, 1980

Appeal from decision of the Wyoming State Office, Bureau of Land Management, cancelling oil and gas lease W 65545 in part.

Reversed.

1. Exchanges of Land: Generally -- Oil and Gas Leases: Cancellation -- Oil and Gas Leases: Lands Subject to -- Regulations: Interpretation

Where an oil and gas lease has inadvertently been issued for land, part of which was the subject of a forest exchange application, the cancellation of that part of the lease will be reversed if the exchange application did not include the mineral estate and has been withdrawn by the proponent, and no other obstacle or objection to the lease exists.

APPEARANCES: William E. Heimann, Esq., Vice President and General Counsel, Kerr-McGee Corp., for appellant.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

Apparently, early in 1978 the Wyoming State Office of the Bureau of Land Management (BLM) compiled a grouping of several legal subdivisions of public land in Campbell County, Wyoming, in a single 720-acre parcel to be made available for the filing of simultaneous oil and gas lease offers. 1/ Certain of these lands, if not all, are administered

1/ These lands are as follows:

T. 43 N., R 70 W., sixth principal meridian
sec. 11: S 1/2 N 1/2
sec. 12: S 1/2 N 1/2
sec. 23: N 1/2 NE 1/4, SE 1/4 NE 1/4, NE 1/4 NW 1/4, NE 1/4 SE 1/4, SW 1/4 SE 1/4
sec. 26: NW 1/4 NW 1/4, NW 1/4 SW 1/4, S 1/2 SW 1/4

for their surface resources by the Forest Service, Department of Agriculture. Therefore, prior to listing the parcel for the simultaneous filing of oil and gas lease offers, BLM solicited the Forest Service's comments and recommendations. On April 25, 1978, the Regional Forester, Denver, recommended the issuance of an oil and gas lease of this parcel subject to certain standard stipulations.

Accordingly, BLM listed the parcel for filing, and conducted a drawing in September 1978 to determine the priority of applicants. The offer of Viva E. Waters was successful, and BLM issued her lease W-65545, effective February 1, 1979. On March 5, 1979, assignment of the entire lease to Kerr-McGee Corporation was filed for approval by BLM, and approval was granted effective April 1, 1979.

On August 17, 1979, BLM canceled the lease as to the 80 acres in the SW 1/4 SE 1/4 sec. 23 and the NW 1/4 NW 1/4 sec. 26, for the reason that these lands should not have been included in the lease because they were the subject of forest exchange application W-49700, filed March 10, 1975. BLM asserted that the filing of the exchange application operated to segregate the land from oil and gas leasing pursuant to 43 CFR 2091.2-3, and that it was error to include these lands in the subject lease. Kerr-McGee has appealed.

By its letter to BLM dated November 14, 1979, Atlantic Richfield advised that the exchange was "no longer viable" and requested that the exchange application be canceled.

Upon review of Atlantic Richfield's exchange application we find that the mineral estate to the 80 acres in question was not involved, but rather, was expressly excluded. In its application Atlantic Richfield offered to convey title to certain lands which it owned to the United States and would accept certain selected lands in return, including these 80 acres. However, it noted expressly that it would accept the selected public lands subject to the exceptions set out in Schedule D of the application, which states that all minerals therein would be excluded from the exchange and reserved to the United States.

43 CFR 2091.2-3 provides:

> The filing of a valid formal application for exchange under the regulations of Group 2200 of this chapter will segregate the selected public lands to the extent that they will not be subject to appropriation under the public land laws, including the mining laws. Any subsequently tendered application, allowance of which is discretionary, will not be accepted, will not be considered as filed, and will be returned to the applicant. The segregative effect of the application on the lands covered by the recall or rejection of an exchange application will terminate at 10 a.m. on the 30th day from and after the date a notice of the recall or rejection of the application is first

posted in the land office having jurisdiction over the lands. [2/] [Emphasis added.]

Notice that the first sentence of the regulation provides only that the filing of a valid exchange application will operate to segregate the selected land to the extent that appropriation under the public land laws, including the mining laws is precluded. Mineral leasing does not constitute an "appropriation" of the land in this context, and it is well understood that where the terms of a segregation or withdrawal do not preclude mineral leasing, the land remains subject to such use. Noel Teuscher, 62 I.D. 210 (1955).

It is also noteworthy that on February 6, 1975, the Forest Service wrote to BLM to inform it of the proposed exchange and to request that these lands be segregated only "from appropriation under the general mining laws." Of course, the regulation segregated the lands from other appropriation as well. Later, the Forest Service expressly recommended that these lands be leased for oil and gas. BLM, in an analysis of the exchange proposal dated October 31, 1975, found:

> (4) The proponent is interested in surface estate exchange only. Mineral status will not be changed as a result of this exchange. The lands involved are valuable for coal, oil and gas. The selected lands cover stripable coal reserves but the offered lands do not. Two hundred acres of the selected lands are covered by Uranium Prospecting Permit Application W-47237.

No objection to the subject oil and gas lease has been raised by the Forest Service or by the exchange proponent, Atlantic Richfield, nor by anyone else insofar as the record shows. Therefore, it appears that there is no practical reason for canceling appellant's oil and gas lease. This leaves the question of whether we are legally obliged to do so.

There are two approaches to the question. First, we might examine and interpret 43 CFR 2091.2-3 to establish whether it actually segregates the land from mineral leasing in these circumstances. We have already noted, supra, that the first sentence of the regulation does not have such effect. However, the second sentence provides, "Any subsequently tendered application, allowance of which is discretionary, will not be accepted, will not be considered as filed, and will be returned to the applicant." Clearly, an oil and gas lease offer is an "application, allowance of which is discretionary." But, where, as here, only the surface estate is the subject of the exchange application and the mineral estate remains unaffected, does the regulation extend to the mineral estate? In prior cases this Board, without analysis of that specific question, has treated the

2/ See 36 FR 15669 ( ) for a discussion of the purpose of the regulatory amendment.

answer in the affirmative. See Paul S. Coupey, 14 IBLA 397 (1974); Tom B. Boston, 6 IBLA 269 (1972).

Assuming, then, without deciding, that the regulation required rejection of that part of Water's lease offer, let us now approach the matter of whether the Department has the legal right or obligation to cancel the lease which BLM improvidently made available and issued, and which has since passed into the hands of appellant by an assignment approved by BLM.

Appellant points to Sec. 2(p) of the lease itself, which states:

> [The Lessee agrees:] If any of the land included in this lease is embraced in a reservation or segregated for any particular purpose, to conduct operations thereunder in conformity with such requirements as may be made by the Director, Bureau of Land Management, for the protection and use of the land for the purpose for which it was reserved or segregated, so far as may be consistent with the use of the land for the purpose of this lease which latter shall be regarded as the dominant use unless otherwise provided herein or separately stipulated. [Emphasis by appellant.]

It is appellant's contention that even where segregated lands are involved this language makes it clear that the lessee's use is the dominant one, and it argues that to cancel an issued lease because the land is segregated would hardly accord with this expression. While we can reasonably infer that this provision was intended to apply to a situation where the oil and gas lease predated the segregation of the land, there is nevertheless some merit in appellant's argument, only in that it recognizes the inherent compatibility of an oil and gas lease.

Appellant also maintains that cancellation would be violative of the bona fide purchaser provision of 30 U.S.C. § 184(h)(2) (1976).

[1] (Perhaps) BLM should not have included these 80 acres in the parcel listed as available for the simultaneous filing of lease offers, and the Forest Service should not have recommended to BLM that they be leased. Having listed them in error, BLM (perhaps) should have rejected Water's lease offer as to these lands. Having leased them to Waters, BLM (perhaps) should not have approved her assignment of the lease to appellant insofar as it included these lands. But all these things were done, without any fault on the part of appellant.

The land had previously been under oil and gas lease during the period when the segregation was operative. The mineral estate is, and will remain, in the United States, and will be subject to further leasing. There has been no objection by the Forest Service, the exchange proponent, or anyone else to the continuation of the lease, and it poses no obstacle to the possible consummation of the exchange,

in view of Atlantic Richfield's withdrawal of its offer. The lease is generating revenue for the United States, and lies in an area which has been identified as potentially productive. It would thus appear that its continuation would be in the public interest. Because the land was listed and leased through the simultaneous filing system, all interested lease applicants had a fair and equal opportunity to obtain a lease.

There is recent judicial precedent for the proposition that a reason which would be a sufficient basis for the rejection of a lease offer will not always support the cancellation of an issued lease. In Christiansen Oil, Inc., 37 IBLA 52 (1978) (Stuebing, Administrative Judge dissenting), this Board affirmed the cancellation of appellant's lease which had been issued by BLM despite the fact that the corporation had listed its own name incorrectly on the lease offer, which should have resulted in rejection of the offer. In reversing the Board's decision, the court agreed with the dissenting board member that "the cancellation of an issued lease for trivial and inconsequential discrepancies is a far different matter from the rejection of a mere offer to lease." The court further found that the reason for cancellation in that case "lacks substance," so that the Board's decision was arbitrary and capricious. Christianson Oil & Gas, Inc. v. Andrus, Civ. No. C 78-257K (D. Wyo. Aug. 20, 1979).

This appears to be another such case. No advantage will accrue to anyone in consequence of this cancellation, and both appellant and the United States would suffer some disadvantage. In these circumstances, cancellation would be needless, purposeless, and counterproductive, even if it were legally supportable.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is reversed.

Edward W. Stuebing
Administrative Judge

We concur:

Joseph W. Goss
Administrative Judge

James L. Burski
Administrative Judge